United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75 - 3003

WALTER WAX and LAWRENCE LEVINE,

Petitioners,

-v-

HON. CONSTANCE BAKER MOTLEY,
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF NEW YORK,

Respondent.

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the
Southern District of New York
Attorney for Respondent

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Preliminary Statement

Walter Wax and Lawrence Levine, two of ten defendants in a twenty-count indictment (74 Cr. 573), seek a writ of mandamus directing the United States District Court for the Southern District of New York, the Honorable Constance Baker Motley, United States District Judge, to dismiss the indictment against them. The District Court denied defendants' motion on January 10, 1975 and filed an opinion on January 17, 1975. The trial, which was originally scheduled to begin on January 14, 1975, has been stayed by this Court until January 22, 1975 pending resolution of this petition.

Since the commencement of this trial has already been stayed, the government does not now oppose this petition on the ground that the Court of Appeals should defer consideration of the merits of petitioners' claim until it arises on appeal after judgment of conviction. Rather, the government requests that the Court reach the issue presented by this petition, because a decision by this Court establishing the legality of the extensions of the term of the [redacted] 1972 Special Grand Jury No. 1 will avoid needless repetition of the same dispute before other district judges in proceedings arising out of the many other indictments returned by this grand jury during the three extensions of its term.

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STATEMENT OF FACTS

1. Proceedings Below

Slightly over two weeks before the trial was scheduled to begin, defendant William K. Chester moved for dismissal of the indictment on the ground that the grand jury was not lawfully sitting at the time it returned the indictment, which was filed more than eighteen months after the grand jury had been impaneled. Other defendants, including petitioners, filed similar motions.

In opposition, the government filed the impaneling and extension orders; affirmations of Chief Judge Edelstein, who signed the impaneling order, and Judge Bonsal, who charged the grand jury and signed the first extension order*; affidavits of Myles Ambrose, former Special Assistant Attorney General and Director of the Office for Drug Abuse Law Enforcement (O.D.A.L.E.), Andrew J. Maloney, former New York Regional Director of O.D.A.L.E., Assistant United States Attorneys Walter M. Phillips, Jr., and Shirah Neiman, who participated in the impaneling process, and Assistant United States Attorney Frank H. Wohl, who presented this case to the grand jury.

* Judge Bonsal's affirmation was not included among the papers filed by petitioners, and is annexed hereto as Exhibit 2.

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The motions were heard on January 10, 1975.

The District Court denied the motions orally on the date of argument and subsequently filed an opinion, dated January 16, 1975, setting forth Judge Motley's finding that the April 1972 Special Grand Jury No. 1 was a special grand jury impaneled under the Organized Crime Control Act of 1970 and, therefore, had been lawfully extended, and was lawfully sitting when the indictment in this case was returned. The District Court's opinion is annexed hereto as Exhibit I.

2. The Grand Jury

In early January, 1972, Myles Ambrose, United States Commissioner of Customs, to be appointed later that month Special Assistant Attorney General of the United States and Director of the Office for Drug Abuse Law Enforcement (O.D.A.L.E.), met with Chief Judge David N. Edelstein of the United States District Court for the Southern District of New York to discuss O.D.A.L.E.'s need for an Organized Crime Control Act special grand jury (18 U.S.C. §§ 3331 et seq.) in the Southern District of New York. Ambrose specifically wanted an Organized Crime Control Act special grand jury because the Act specifically gave such grand juries the power to issue reports, which Ambrose

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regarded as an important part of the O.D.A.L.E. program.* Chief Judge Edelstein agreed to impanel such a grand jury for O.D.A.L.E. (Edelstein Affirmation; Ambrose Affidavit) Ambrose also discussed the matter with Whitney North Seymour, Jr., the United States Attorney for the Southern District of New York and obtained Mr. Seymour's agreement to assist in O.D.A.L.E.'s impaneling of such a grand jury.

In late February and early March, 1972, Mr. Ambrose discussed the need for such a § 3331 grand jury with Andrew J. Maloney, soon to be appointed New York Regional Director for O.D.A.L.E. (Ambrose Affidavit; Maloney Affidavit).

In early March, 1972, Mr. Maloney called Shirah Neiman, the Assistant United States Attorney in charge of grand jury matters for the United States Attorney's office, and requested the assistance of the United States Attorney's office in impaneling an O.D.A.L.E. Organized Crime Control Act special grand jury. (Maloney Affidavit; Neiman Affidavit). The order and certification routinely used in this District were prepared and forwarded to O.D.A.L.E. Miss Neiman specifically checked

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* Mr. Ambrose's affidavit appends as Exhibit II a statement by the President of the United States accompanying the creation of O.D.A.L.E., in which specific reference is made to the intended use by O.D.A.L.E. of "new authorities granted in the Organized Crime Control Act of 1970."

the proposed order against the relevant provisions of the Organized Crime Control Act to make sure that the order complied with the Act. (Neiman Affidavit)

Chief Judge Edelstein signed and filed the order on March 17, 1972. The order did not specifically state whether the grand jury was impaneled pursuant to Rule 6 of the Federal Rules of Criminal Procedure or the Organized Crime Control Act of 1970, 18 U.S.C. §3331. Nor did the order state the length of time for which the grand jury would sit, except that this grand jury was an "Additional Grand Jury for the April 1972 Term of Court," and that it would serve "from April 18, 1972 at said Court." The order contained no specification of the type of business the grand jury would conduct beyond saying that it was impaneled "for the disposal of Government business of the said Southern District of New York." (Exhibit B to Affidavit of Defendants' Counsel in this Court, Wohl Affidavit, Exhibit 1).

The jury panel was to be drawn on April 17, 1972. Around that time Mr. Maloney called Walter Phillips, another Assistant United States Attorney and Chief of the Narcotics Unit in the United States Attorney's office, and asked

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Mr. Phillips to stand in for him at the O.D.A.L.E. grand jury impaneling because Maloney could not be there. At the impaneling, which occurred on April 18, 1972, Mr. Phillips appeared for Mr. Maloney. Prior to the proceedings Mr. Phillips informed Chief Judge Edelstein that this was the O.D.A.L.E. special grand jury which would be investigating narcotics. (Phillips Affidavit).

Chief Judge Edelstein explained to the prospective grand jurors that they would be investigating narcotics matters. Chief Judge Edelstein then selected the grand jurors who would serve and ruled on any of their statements of why they could or should not serve. As is his usual practice, Chief Judge Edelstein then turned the proceedings over to another district court judge -- that particular week, Judge Dudley B. Bonsal -- who chose the foreman and deputy foreman, presided over the administration of the jurors' oath, and charged the new grand jury.*

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* No record was made of the proceedings over which Chief Judge Edelstein presided. A recording was made by a court reporter of a substantial portion of Judge Bonsal's part in these proceedings. The government has reviewed the transcript of the proceedings under Judge Bonsal and has concluded that this transcript is not helpful in the resolution of the issue presented here, one way or the other. This is so for two reasons: (1) Chief Judge Edelstein's understanding of the nature of the grand jury he ordered controls; (2) Judge Bonsal gave a standard grand jury charge and talked a bit with the jurors, mentioning their duty to investigate narcotics matters, and there is no other indication that he was aware of whether this grand jury was to be a Rule 6 grand jury or an Organized Crime Control Act special grand jury.

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(Edelstein Affirmation; Bonsal Affirmation; Phillips Affidavit) Mr. Phillips then told the grand jury that they were to be designated the April 1972 Special Grand Jury No. 1.

The grand jury's first session was on May 2, 1972. On that date Mr. Ambrose and Mr. Maloney appeared before the grand jury and explained the O.D.A.L.E. goals to the jurors and also told them that a grand jury report would be expected. The grand jury then embarked on its investigations of narcotics matters presented to it by the O.D.A.L.E. staff attorneys. When the grand jury had extra time, however, it also considered matters presented to it by members of the United States Attorney's office. (Ambrose Affidavit) When O.D.A.L.E. ceased its operations, in June 1973, several members of its staff transferred to the United States Attorney's office for the Southern District of New York, where they became Special Assistant United States Attorneys. Under the supervision of that office the April 1972 Special Grand Jury No. 1 continued its investigations begun under O.D.A.L.E., and embarked on new investigations as well. (Ambrose Affidavit)

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By order of Judge Bonsal, filed October 5, 1973, the term of the April 1972 Special Grand Jury No. 1 was extended from October 18, 1973 until April 18, 1974. By order of Chief Judge Edelstein, filed April 15, 1974 another extension, from April 18, 1974 to October 18, 1974 was ordered. The order of Judge Lloyd F. MacMahon, filed October 11, 1974, extended the term of the grand jury from October 18, 1974 through April 17, 1975. (Wohl Affidavit, Exhibits 2, 3 and 4)

3. The Indictment

The indictment in this case was returned on June 4, 1974 by the April 1972 Special Grand Jury No. 1 as a result of an investigation which this grand jury commenced in February, 1974. At the time the grand jury began the investigation it was serving the first six-month extension of its term, ordered by Judge Bonsal in an order filed October 5, 1973. At the time the indictment was returned the grand jury was serving its second extension, by order of Chief Judge Edelstein, filed April 15, 1974. (Wohl Affidavit).

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ARGUMENT

I. THE GRAND JURY WAS SITTING DURING A LAWFUL EXTENSION OF ITS TERM WHEN IT RETURNED THE INDICTMENT IN THIS CASE.

The extensions of the term of the April 1972 Special Grand Jury No. 1 were, as the District Court found, lawful extensions. Consequently the grand jury was properly in session in June, 1974, during the second of its extensions, when this indictment was returned; and the District Court was correct in denying defendants' motion to dismiss the indictment. This grand jury was impaneled pursuant to Chapter 216 of the Organized Crime Control Act of 1970, Pub. L. 91-452, Tit. I, §101(a), Oct 15, 1970, 84 Stat. 923 (18 U.S.C. §§3331 et seq.) which provides,

> [i]n addition to such other grand juries as shall be called from time to time, each district court which is located in a judicial district containing more than four million inhabitants . . . shall order a special grand jury to be summoned at least once in each period of eighteen months unless another special grand jury is then serving.[8]
>
> 18 U.S.C. §3331(a)

[8]Although created by the Congress within the context of legislation directed at the menace of "organized crime," these special grand juries are not limited to the investigation of any particular subject matter. See United States v. Fein, 504 F.2d 1170, 1178 n. 11 (2d Cir. 1974). They are empowered "to inquire into offenses against the criminal laws of the United States alleged to have been committed within [their] district." 18 U.S.C. §3332(a). Thus, their investigative range is no more or less than that of a grand jury summoned pursuant to Fed. R. Crim. 6(a). There is no indication in the legislative history of the Organized Crime Control Act of 1970, that Congress intended provisions

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of the act to be used solely against "organized crime" in any narrow sense. See United States v. Carter, 493 F.2d 704, 708 n. 2 (2d Cir. 1974). Cf. generally United States v. Archer, 486 F.2d 670, 678-680 (2d Cir. 1973).

These special grand juries differ from normal grand juries, impaneled pursuant to Rule 6 of the Federal Rules of Criminal Procedure in at least two important respects. First, original terms of service of eighteen months may be extended by order of the district court for a maximum of three extension periods of six months each:

> If, at the end of such term or any extension thereof, the district court determines the business of the grand jury has not been completed, the court may enter an order extending such term for an additional period of six months. No special grand jury term so extended shall exceed thirty-six months. . . . 18 U.S.C. §3331 (a).

Other grand juries may not be so extended. Fed. R. Crim. P. 6(g). Another distinction between the special grand juries impaneled under the Organized Crime Control Act of 1970 and other grand juries is that the Organized Crime Control Act empowers the special grand juries to issue reports. 18 U.S.C. § 3333. The authority of ordinary grand juries to file reports is questionable. See Application of United Electrical, Radio & Machine Workers of America, 111 F. Supp. 858 (S.D.N.Y. 1953) (Weinfeld, J.).

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A. The District Court's Finding That The Grand Jury Which Returned the Indictment In This Case Was An Organized Crime Control Act Special Grand Jury From the Moment It Was Impaneled, Was Clearly Correct.

The record before the District Court on the motion establishes that the grand jury which returned this indictment was impaneled under the provisions of 18 U.S.C. § 3331 et seq. Chief Judge Edelstein's affirmation establishes that he understood that he was impaneling this grand jury under those provisions, and the affidavits of former Special Assistant Attorney General Ambrose, former O.D.A.L.E. Regional Director Maloney, and Assistant United States Attorney Neiman establish that it was their understanding and intention that a grand jury under those provisions of law be impaneled. In addition, the three orders extending the life of the grand jury show that the grand jury has been treated precisely as a §3331 grand jury should be and with the plain understanding that it is one. The net of the matter is that the Chief Judge and every prosecutor who has focused on the nature of this grand jury -- even before its inception -- have understood that it was impaneled under Section 3331 et seq. of Title 18.[8]

[8] The foregoing establishes the utter baselessness of petitioner's contention that this grand jury was impaneled as neither a §3331 or Rule 6 grand jury so that the government might decide, on the basis of the grand jury's prosecutorial bent at the end of 18 months, whether to deem it a §3331 grand jury and extend its life. Indeed, even if that had been the government's intention, and it was not, the grand jury was impaneled by an order of the Chief Judge of the Court, whose intentions and understanding of the nature of this grand jury would plainly be controlling.

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In an effort to frustrate further proceedings in their prosecution, defendants have simply seized upon the fact that the order signed by the Chief Judge directing the impaneling of this grand jury makes no reference to sections 3331 et seq. of Title 18 and is in the same form as the orders used to impanel grand juries under Rule 6 of the Federal Rules of Criminal Procedure. Defendants therefore insist that this is a Rule 6 grand jury, and relying on United States v. Fein, supra, they accordingly claim that the orders extending the life of the grand jury beyond this 18 month period were unlawful, and that this indictment was therefore not returned by a valid grand jury.

It is important at the outset to perceive the hypertechnical nature of the claim here raised. Defendants have shown no substantial factual basis to dispute the understanding of the Chief Judge and the prosecutors that the grand jury is a §3331 grand jury and always has been. Nor do defendants claim that the grand jury was not validly impaneled and sworn, or that there was any impropriety in impaneling this grand jury under §3331. Nor in this Court do they claim any defect in the extension orders.

Defendants' entire argument boils down to the fact that Chief Judge Edelstein's impaneling order contains no reference to §3331. Defendants' claim that the absence of such a reference conclusively establishes that this grand jury was impaneled under Rule 6 is thus of the weakest sort. While, to be sure, there is no language in the impaneling order referring to §3331, there is no reference to Rule 6 either. Moreover, there is no stated time limitation on the life of the grand jury. The order refers to an "additional special grand jury;" Section 3332(b) refers to an "additional special grand jury" and Rule 6 does not use the term "additional." Moreover, defendants make no showing that the language of the order impaneling the grand jury was insufficient to impanel a §3331 grand jury except by carping on the absence of a specific citation to the statute, thereby ignoring the simple fact that §3331 states no formal requirements for the language of an order impaneling a grand jury under its provisions.

This Court's decision in United States v. Fein, supra, is of no assistance to defendants here. In Fein, in contrast to this case, the impaneling order specifically provided "that 'pursuant to Rule 6(a) and (g) of the Federal Rules of Criminal Procedure, a Special Grand

Jury be convened...to serve for a period not to exceed eighteen (18) months...'" 504 F.2d at 1171. The government conceded that the grand jury which indicted Fein was impaneled as a Rule 6 grand jury. 504 F.2d at 1179 n. 10. The argument the government made, and lost, in Fein was that a grand jury specifically impaneled under Rule 6 could nonetheless be extended under §3331. Here, in contrast to Fein, the record establishes, and the impaneling order in no way controverts, that this grand jury was conceived, born, and has lived its entire life, as a §3331 grand jury.

Under the circumstances here, the failure of the order specifically to set forth a statutory citation or to otherwise identify the kind of grand jury being impaneled is, at most, a technical error which certainly does not invalidate the proceedings or materially alter their effect. None of the statutory provisions authorizing the impaneling of a grand jury prescribe any talismanic language as essential to a valid order. Rather, Congress left the language of orders summoning all grand juries within the discretion of the various district courts.[9]

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[9] See United States v. Lewis, 192 F. 633, 636 (D. C. Mo. 1911) where the court stated the sensible proposition that if Congress did not see fit to prescribe an element for an impaneling order -- in that case the term of service -- it was not required to be in the order.

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Rule 6(a) provides,

> The Court shall order one or more grand juries to be summoned at such times as the public interest requires.

Section 3332(b) states, "... the district court may order an additional special grand jury ... to be impaneled. See also 18 U.S.C., §3331(a). Thus, while the grand jury may very well be "a creature of statute," United States v. Fein, supra, 504 F.2d at 1172, it is not a slave, whose life depends on citation of statute.*

The courts have repeatedly rejected arguments, similar to those urged by defendants here, that technical irregularities in impaneling procedures will nullify or materially alter a grand jury's authority. In Breese v.

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* Even the elaborate local plans for jury selection mandated by the Jury Selection and Service Act of 1968, Pub. L. 90-274, § 101, as amended by Pub. L. 92-269, §2, April 6, 1972 (28 U.S.C. §§ 1861 et seq.) do not undertake to dictate form or language. See also Plan for Random Selection of Grand and Petit Jurors in the United States District Court of the Southern District of New York, filed October 18, 1969.

United States, 203 F. 824 (4th Cir. 1913) the court upheld an indictment, even though the district court had not expressly issued the writ of venire facias required by statute, on the ground that the district court had clearly intended to issue such an order. In Nolan v. United States, 163 F.2d 768 (8th Cir. 1947) cert. denied 333 U.S. 846 (1948) a grand jury's action was held valid, even though the district judge had failed to sign the impaneling order, on the ground that the statute did not require a written or signed order to impanel a grand jury. To the same effect is United States v. Reed, Fed. Cas. No. 16,134, 27 Fed. Cases 733 (N.D.N.Y. 1852) in which an oral impaneling order was held valid, under a New York statute, even though the clerk had failed to enter it. See also Fries' Case, Fed. Cas. No. 5126, 9 Fed. Cases 826, 923 (1799) in which a grand jury impaneled without an express judicial order was held valid, although a new trial was granted on other grounds.

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B. The District Court Was Correct In Looking To Extrinsic Evidence To Establish The Meaning Of The Ambiguous Impaneling Order

When confronted with an order which did not clearly state whether the grand jury was an ordinary grand jury or an Organized Crime Control Act special grand jury, the District Court turned to the circumstances surrounding the impaneling. The evidence established, as Judge Motley found, that the grand jury was indeed, from its inception, an Organized Crime Control Act special grand jury. Naturally the District Court looked to the intent of the Chief Judge who impaneled the grand jury, as well as the intent of other participants in the proceeding.

In consulting such sources Judge Motley followed the example of another district court judge, in United States v. King, Case #2354, 2355, 742, CCH Fed. Trade Cases p. 75,368 (W.D. Ky., Dkt. Nos. 2354, 2355, decided July 10, 1974).* In that case the defendants alleged that the grand jury which indicted them was an Organized Crime Control Act special grand jury. If it was, they asserted it would be invalid because there was no written certification from the authorized Department of Justice official, as required by the Organized Crime Control Act, to impanel

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* The King opinion is attached hereto as Exhibit 3.

a special grand jury in a district with a population of less than four million. The impaneling order recited that a "special grand jury" was being summoned. It cited no statutory authority. The trial judge turned to extrinsic evidence, including letters written from the requesting agency, the Anti-Trust Division of the Justice Department, to the Chief Judge, explaining the Division's grand jury needs, and a letter from the Anti-Trust Division to the United States Attorney asking for the impaneling of the grand jury. The district court ruled that, in spite of the word "special" in the impaneling order, the surrounding facts and circumstances showed that the court had impaneled a Rule 6(a) grand jury, and denied the motion to dismiss.

Faced with the clear proof that the grand jury here in issue was in fact an Organized Crime Control Act special grand jury, defendants seek to prevent the Court from determining and carrying out the true intent of the impaneling proceedings. Defendants claim that the parol evidence rule precludes any attempt to learn the meaning of the order by consideration of facts outside the four corners of the order itself. Defendants also necessarily advance, in support of their argument, the proposition that the impaneling

order is "clear and unambiguous," but, ironically, this contention is based not on the language of the order itself, but on extrinsic evidence such as other impaneling orders and the practices of the United States Attorney's office concerning other grand juries. Thus defendants do not limit their arguments to the four corners of the order impaneling this grand jury, but they seek to prevent the Court from considering the most compelling evidence on the issue, apparently because that evidence requires a conclusion that defendants dislike.

The defendants and the government, then, agree that it is not possible to tell which type of grand jury was impaneled solely by reference to the face of the impaneling order.

This circuit has stated that language "is ambiguous, within the meaning of the parol evidence rule when it may reasonably be construed in more than one sense," and that such an ambiguity permits any available extrinsic evidence for the purpose of establishing intent. Union Insurance Soc. of Canton, Ltd. v. William Gluckin & Co., 353 F. 2d 946, 951 (2d Cir. 1965). The same rule applies to judicial orders, although, as Wigmore points out, the exception to the parol evidence rule is often expressed in terms of the power of a court to amend its record nunc pro tunc so as to protect the theoretical inviolability of the record, while at the same time removing error to

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avoid injustice."*

As a practical matter the rule applicable here is found in the fundamental principle that all courts have the inherent power "to correct [their] records, so that they shall speak the truth." Federal Trade Commission v. Standard Education Soc., 146 F. 2d 931, 932 (2d Cir. 1945). And the cases are legion which demonstrate that courts use this principle to construe, amend and correct records to reflect what was meant to have been shown at the time the record was made. See, e.g., Wilson v. Bell, 137 F.2d 716, 720 (8th Cir. 1943); Ex Parte United States, 101 F.2d 870, 874 (7th Cir.), aff'd equally divided court, 308 U.S. 519 (1939); Downey v. United States, 91 F.2d 223, 230 (D.C. Cir. 1937); Moss v. United States, 72 F.2d 30, 31 (4th Cir. 1943). Kelly v. Harris, 158 F. Supp. 243, 247 (D. Mont. 1958).

In the case of an ambiguous record the facts to be considered in determining what the record was actually intended to show are, perforce, extrinsic facts. As it was put by the court in Downey v. United States, supra 91 F. 2d at 230:

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*Wigmore on Evidence, 3d ed., §2450, p. 139. See also In Re Crosby Stores, 65 F. 2d 360, 361 (2d Cir. 1933); In Re Union League of Chicago, 203 F.2d 381, 386 (9th Cir. 1953). While the order impaneling the grand jury has not been modified to add an express citation to 18 U.S.C. §3331, that is a formality which, if even necessary, may be disposed of ministerially after the conclusion of the proceeding before this Court.

> The court had power to correct its record to show the truth, provided its record did not conform thereto. But the exercise of the power to correct was contingent thus upon a showing of disparity between the record and the truth, and hence upon a showing of the truth itself.

It follows that to show the truth itself, reference must be made to extrinsic evidence, and the courts have so held. See, e.g., Louisiana Land & Exploration Co. v. Jefferson, La., 59 F. Supp. 260, 266 (D. La. 1945); Mueller v. Mueller, 124 F. 2d 544, 548 (8th Cir.), cert. dismissed, 316 U.S. 649 (1942).

Moreover, without specifically invoking this exception to the parol evidence rule, courts often turn to evidence outside the record to clarify ambiguous orders.* For instance, the Supreme Court has said that the meaning of an ambiguous order "must be determined by what preceded it and what it was intended to execute." Union Pacific Railroad Co. v. Mason City & Railroad Co., 222 U.S. 237, 247 (1911). Cf. United States v. Rizzo, 492 F.2d 443, 446 (2d Cir. 1974); United States v. Jenkins, 490 F.2d 868, 878 (2d Cir. 1973). And, "[w]here a judgment is susceptible of two interpretations, it is the duty of the court

* The inquiry of course, it directed to clarification of the issuing judge's intent at the time he entered the order. Cf. Gila Valley Irr. Dist. v. United States, 118 F.2d 507, 510 (9th Cir. 1941); extrinsic evidence supplied by the judge who entered the order is entirely proper. See, e.g., Miami County Nat. Bank of Paola, Kan. v. Bancroft, 121 F.2d 921, 927 (8th Cir. 1941).

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adopt the one which renders it more reasonable, effective and conclusive in the light of the facts and law of the case." Hendrix v. Lowmaster, 152 F.2d 83, 85 (6th Cir. 1945).

Defendants' position is thus wholly without support in fact, reason or law. First, their fundamental proposition, that the order is "clear and unambiguous" as to which type of grand jury was impaneled, is simply not true, as petitioners appear to acknowledge when they seek to rely on the other orders used to impanel grand juries in this district. The face of the order simply does not disclose what kind of grand jury was impaneled. Second, extrinsic evidence is admissible and, moreover the extrinsic evidence on which defendants seek to rely proves nothing. They claim that the fact that the impaneling order here in issue is identical or similar to other impaneling orders in some way proves that Chief Judge Edelstein either intended to impanel a Rule 6 grand jury, or that by a technical error he in fact impaneled a Rule 6 grand jury despite his intention to impanel an Organized Crime Control Act special grand jury. Even the use of an identical form order to impanel all grand juries would not support the conclusion defendants seek. The mere fact that the order was used, prior to enactment of the Organized Crime Control Act of 1970, only to impanel Rule 6 grand juries does not help defendants, since prior to the enactment of the Act, the Rule 6 grand jury was the only kind of grand jury that existed in the federal system. After enactment of the new statute,

the order to impanel an "additional grand jury" is capable of impaneling either a Rule 6 grand jury or an Organized Crime Control Act special grand jury."

Judge Motley, having properly considered the facts and circumstances surrounding the impaneling of the April 1972 Special Grand Jury No. 1, including the affirmation of the Chief Judge who impaneled it, as against the speculation indulged in by defendants, decided that the grand jury is and was always, a Section 3331(a) grand jury subject to lawful extension under the Organized Crime Control Act of 1970.

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*This, of course, is not to say that it would not be wiser in the future to include a specific citation to 18 U.S.C. §3331 in orders impaneling grand juries under that section, if only to forestall the litigation which the absence of that citation has provoked here. The wisdom of this course was not so obvious, however, prior to this court's decision in United States v. Fein, supra. The government has not contended that the absence of a clear designation in the order here at issue was part of a deliberate design on the part of the United States Attorney's office. Indeed, ther order was drafted by an O.D.A.L.E. attorney with Assistant United States Attorney Neiman's assistance. The general policy of secrecy of grand jury investigations, and a desire to defer or avoid unnecessary risks of improper disclosure, has been referred to merely as one possible factor which might reasonably account for what was, in light of Fein, a lack of prescience.

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Judge Motley's decision was entirely consistent with the operating principle set forth in In Re Wight, 134 U.S. 136, 145 (1888), where, in considering the power of a court to correct its records to accurately show what had in fact occurred, the Supreme Court quoted with approval from a Minnesota case:

> . . . [w]e should be scrupulously careful in adopting any rule which would tend to destroy the sanctity or lessen the verity of the records . . . [w]e deprecate the exercise of the power in any case where there was the least room for doubt about the facts upon which the amendment was sought to be made. . . . . But when the facts stand undisputed, and the objection is based upon a technical point alone . . . . it would be doing violence to the spirit which pervades the administration of justice in the present age to sustain it. It is our opinion that this power, of necessity, exists in the District Court, and that its exercise must in great measure be governed by the facts of each case.

The circuit court in Ex Parte United States, supra, faced with an attack on a trial judge's construction of the record has said that:

> Unless a trial court clearly abuses its discretionary powers an appellate court will refrain from disturbing orders of modification and amendment, which seek only to make the record speak the truth. 101 F.2d at 874.

The effect of Judge Motley's decision is to do no more and no less than to merely make the record speak the truth with respect to the grand jury at issue here.

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II. The District Court Was Correct In Deciding Defendants' Motions Without An Evidentiary Hearing

Defendants now claim, as they did not below, that their motions to dismiss the indictment cannot be denied without a hearing. The record is clear, however, that an evidentiary hearing would serve no purpose, except to waste the district court's time while defense counsel conduct a grandiose fishing expedition. Defendants have suggested no evidence which they would present at such a hearing, and defense counsel admitted in oral argument before this Court that he would not seek to cross-examine Chief Judge Edelstein, whose actions and intent are dispositive of the entire motion. Rather, defense counsel would seek to cross-examine the various government officials connected with the impaneling of this grand jury. Clearly nothing they could say during such cross-examination would be of critical significance to resolution of this motion in light of Chief Judge Edelstein's intent to impanel an Organized Crime Control Act special grand jury at the request of O.D.A.L.E.

In addition, defendants' papers in this Court make clear that, if such a hearing were granted, they would seek to use it as an opportunity to discover what kinds of investigations this grand jury conducted and whether O.D.A.L.E. really required such a grand jury. Obviously, the enterprise on which defense

counsel seek to take the District Court would rapidly lead to disclosure of actual investigations conducted by the grand jury as well as possible attempts to call jurors as witnesses.

Not only are such matters entirely irrelevant to the issues raised by defendants' motion, but they are also precisely the matters which the traditional rules of secrecy of grand jury business seek to protect. The language of the Supreme Court, in United States v. Johnson, 319 U.S. 503, 513 (1943), rejecting a position similar to that urged by defendants here, is again pertinent:

> Were the ruling of the court below allowed to stand, the mere challenge, in effect, of the regularity of a grand jury's proceedings would cast upon the government the affirmative duty of proving such regularity. Nothing could be more destructive of the workings of our grand jury system or more hostile to its historic status. That institution, unlike the situation in many states, is part of the federal constitutional system. To allow the intrusion, implied by the lower court's attitude, into the indispensable secrecy of grand jury proceedings-as important for the protection of the innocent as for the pursuit of the guilty-would subvert the functions of federal grand juries by all sorts of devices which some states have seen fit to permit in their local procedure, such as ready resort to inspection of grand jury minutes. The district court was quite within its right in striking the preliminary motions which challenged the legality of the grand jury that

returned the indictment. To construe these pleadings as the court below did would be to resuscitate seventeenth century notions of interpreting pleadings and to do so in an aggravated form by applying them to the administration of the criminal law in the twentieth century. Protections of substance which now safeguard the rights of the accused do not require the invention of such new refinements of criminal pleading.

In such circumstances Rule 12 of the Federal Rules of Criminal Procedure empowers the District Court to decide such motions of affidavits without a hearing, as Judge Motley did here. Under analagous circumstances, this Court has apparently approved of a similar procedure. See United States v. Becker, 461 F.2d 230, 235 (2d Cir.) vacated ____ U.S. ___ 42 U.S.L.W. 3652 (May 28, 1974); United States v. Pisacano, 459 F.2d 259, 261 (2d Cir.) vacated ___ U.S. ____ 42 U.S.L.W. 3652 (May 28, 1974); United States v. Rizzo, 492 F.2d 443 (2d Cir. 1974); United States v. Kahn, 472 F.2d 272, 289 n. 20 (2d Cir.), cert. denied. 411 U. S. 982 (1973). See also United States v. Fujimoto, 102 F. Supp. 890 (D. Hawaii 1952), rejecting a defense claim, similar to that of defendants here, that although the moving papers failed to show defendant's entitlement to relief, he should be granted a hearing to develop his claim. See also United States v. Wolfson, 289 F. Supp. 903 (S.D.N.Y. 1968); In re Alperin 355 F. Supp. 372 (D. Mass. 1973), aff'd., 478 F.2d 194 (1st Cir. 1973).

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III. THE ORGANIZED CRIME CONTROL ACT PERMITS MORE THAN TWO SPECIAL GRAND JURIES TO SIT AT THE SAME TIME.

Defendants also claim that the Organized Crime Control Act places a limitation of two on the number of Organized Crime Control Act special grand juries which may sit in any judicial district at one time. This argument, entirely without merit, is based on a strained implication which defendants seek to draw from 18 U.S.C. §3332(b). The statute contains no statement which either expressly or by fair implication limits the number of Organized Crime Control Act special grand juries which may sit in a district with a population in excess of four million. Clearly, Congress left that determination to the discretion of each district court. Had Congress wished to legislate any such limitations as those proposed by defendants here, it could easily have done so clearly and explicitly. Congress would not have left such a critical provision -- which could result in invalidating many indictments in the organized crime matters which Congress sought to vigorously prosecute through the Act -- at the mercy of the ambiguity on which defendants rely.

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The Court of Appeals for the Seventh Circuit has already rejected defendants' argument. In Korman v. United States, 486 F.2d 926, 954 (7th Cir. 1973), that court stated:

> "The legislative history of the Organized Crime Control Act of 1970 indicates that the Special Grand Jury was created as an instrument to investigate organized crime in areas where such criminal activity was evident. It would thwart the purpose of the act to limit to two the number of Special Grand Juries in a District when in fact four or five were necessary for adequate investigation of organized crime."

In United States v. Lawson, ___ F.2d ____ (Dkt. No. 74-1134 (7th Cir., November 26, 1974) that court reaffirmed the same position, noting,

> . . . we are of the opinion that the subsection of the statute does authorize an additional special grand jury to be impaneled whenever the volume of business is determined by the district court to require it.
>
> If the intent had been to limit additional grand juries to one only, that intent could have been easily and explicitly stated. It was not and we decline to read in the limitation. Such limitation would have been an artificial one and . . . thwarting of the purposes of the Act.

PHW:bj
n-734

CONCLUSION

Petitioners' application for a writ of mandamus should be denied, and the stay should be vacated.

Respectfully submitted,

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

JO ANN HARRIS
FRANK H. WOHL
JOHN D. GORDAN, III
Assistant United States Attorneys

- Of Counsel -

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA, :

:

-v- :

: 74 CR. 573

NORMAN RUBINSON, et al., :

Defendants. :

- -

MEMORANDUM OPINION RE GRAND JURY

On January 10, 1975 the court denied all defendants' motions to dismiss the indictment on the theory that the grand jury returned this indictment during a period during which it had been unlawfully extended. For the reasons which follow the court denied the motions from the bench.

Defendants rely primarily on United States v. Fein, ___ F.2d ___ (2d Cir. decided October 15, 1974) (Docket No. 74-1446). As the court reads Fein, grand juries, other than "special grand juries" cannot be lawfully extended beyond 18 months. Federal Rules of Criminal Procedure, Rule 6(g).

Both the Government and defendants agree that the grand jury here involved was empanelled on April 18, 1972 pursuant to

Chief Judge Edelstein's order filed March 17, 1972. The life of this grand jury was extended by court orders for six month periods filed on October 5, 1973 (Bonsal, J.), April 15, 1974 (Edelstein, C.J.), and October 11, 1974 (MacMahon, J..). The instant indictment was returned on June 4, 1974. With this factual background in mind, the court's inquiry was necessarily limited to the question of whether or not the grand jury was regular or special since appropriate characterization determined the legality of the extension.

It was defendants' position that the grand jury was a regular grand jury. Defendants relied primarily on Chief Judge Edelstein's order of March 17, 1972 which failed to characterize the grand jury as "special". Defendants argued that this was conclusive evidence that the grand jury was not special. Accordingly, the court understood defendants' position to be that calling various Assistant United States Attorneys, the Chief Judge or other Judges as witnesses to testify as to the nature of the grand jury would not be probative since that testimony might be self-servingly shaped in light of Fein. Defendants further argued that parol should not be permitted to vary the terms of the original order.

The Government's position which is reflected in affidavits by various Assistant United States Attorneys, certificates

by the United States Attorneys, court orders and an affirmation by Chief Judge Edelstein, was essentially that the grand jury which returned this indictment was intended to be and was consistently treated as a special grand jury. Accordingly, the extensions were justified under 18 U.S.C. § 3331(a) and Fein, and the grand jury was lawfully empanelled when the instant indictment was returned. The court, after turning to extrinsic evidence, United States v. King, ___ F.Supp. ___ (W.D.Ky. decided July 10, 1974) (Docket Nos. 2354, 2355), 74-2 Fed. Trade Cases, p. 75, 368, agreed with the Government's analysis.

In particular the court notes that, notwithstanding the fact that the original order authorizing empanelling referred to it as an "additional" grand jury, subsequent extensions referred to it as a "special" grand jury. (See orders of October 5, 1973, April 15, 1974, and October 11, 1974.) Notably these extensions were ordered prior to the Second Circuit's decision in Fein. Certainly the court is not without power to correct a previous error or omission nunc pro tunc where its intention was to have a special grand jury empanelled and extended. Furthermore, the certificates of Paul J. Curran, United States Attorney for the Southern District of New York, dated October 3, 1973, April 15, 1974, and October 9, 1974 refer to the grand jury as "special." As in other related contexts, absent a showing of bad faith,

certification in accordance with the statute is presumed correct. In any event, the trial court is not to make a de novo determination. See United States v. Singleton, 460 F.2d 1148, 1154 (2d Cir. 1972), cert. denied, 410 U. S. 984 (1973) (analogous statutes and cases collected). See also United States v. Carter, 493 F.2d 704 (2d Cir. 1974). Accordingly, the court relied heavily on Mr. Curran's characterization of the grand jury as "special".[1]

The court was also persuaded by the affirmation of January 9, 1975 of Chief Judge Edelstein to the effect that he and the Special Assistant familiar with these matters (Myles J. Ambrose) intended to empanel a special grand jury. This treatment is verified by the orders extending the grand jury which bear all the hallmarks of a special grand jury lawfully extended under 18 U.S.C. § 3331(a). Those orders not only refer to § 3331(a), but carefully limit the life of the grand jury to the normally prescribed 36 months. Indeed, the order of October 11, 1974 grants an extension "for a final period of six months."

Finally the court notes that § 3331(a) permits empanelling of a grand jury "[i]n addition to such other grand juries as shall be called from time to time. . . ." This language suggests that "additional" grand jury may well be synonymous with "special" grand jury. Both of these terms contrast with "regular" grand jury, extensions of which (beyond eighteen months) are defective

under Fein. The court further notes the obvious — that is, had the initial grand jury order clearly identified the panel as "special" no issue such as is now under discussion, would have arisen. In an open society, such as ours attempts to be, the court looks with disfavor upon the Government's claim that clearly identifying the grand jury as "special" might have jeopardized its investigations.[2/]

Based both on the statute and the treatment accorded this grand jury, the court concluded that this was a special grand jury. Thus the court held that the extensions and subsequent indictment were lawful, that Fein was not to the contrary, and the motions to dismiss must be and were denied.

As a miscellaneous matter, defendants argued that no more than two special grand juries could sit at the same time and that the instant grand jury was in excess of the two permitted by statute. Such a strained construction of the statute was rejected in Korman v. United States, 486 F.2d 926, 934 (7th Cir. 1973) and the court likewise rejected it here.

Finally, defendants argued that Judges other than the Chief Judge of the district were without power to order extensions. The face of the statute gives the "district court" power to grant extensions. The court interprets this to mean that any Judge of the District Court is authorized to extend the life of

a special grand jury upon proper application. Since elsewhere in the statute "chief judge" is used where power is limited to the Chief Judge, the court assumes that had Congress intended to limit the power of extensions to the Chief Judge, that intention would have been manifest on the face of § 3331(a). Accordingly, defendants' motions based on multiple special grand juries and impermissible extensions were also denied.

Dated: New York, New York

January 16, 1975

CONSTANCE BAKER MOTLEY
U. S. D. J.

FOOTNOTES

1. Defendants directed the court's attention to Mr. Seymour's certificate of March 17, 1972 which failed to refer to the grand jury as "special". In the court's view, repeated reference to "special" in subsequent certificates cured this omission.

2. In view of the fact that subsequent certificates and orders referred to the grand jury as "special", this argument seems particularly disingenuous.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v -

NORMAN RUBINSON, et al.,

Defendants.

AFFIRMATION

74 Cr. 573 (CBM)

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

DUDLEY B. BONSAL affirms:

1. I am a United States District Judge for the Southern District of New York, and was serving in this capacity in 1972.

2. On April 18, 1972, I presided when the Grand Jury was sworn. I appointed Mr. Eldridge foreman and I then charged the Grand Jury.

3. I have no definite recollection as to whether I was told that this was an Organized Crime Act Grand Jury at the time I charged the jury, but I knew that it was a Grand Jury to investigate violations of the narcotics laws.

4. I had a note in my file with regard to this Grand Jury. A copy is annexed to my affirmation as Exhibit A. I rely on this note in part for my memory that I knew at the time that this was an Office of Drug Abuse Law

Enforcement (O.D.A.L.E.) Grand Jury to investigate narcotics cases. I also relied upon the reference to narcotics cases in the minutes of my charge.

5. I have also reviewed an Order which I signed on October 4, 1973 extending the life of this Grand Jury pursuant to §3331(a) of Title 18 U.S.C.

Dudley B. Bonsal
United States District Court Judge

Dated: New York, New York
January 10, 1975

TO: Norman Rubinson
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Form 280 A. -Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Patricia D. Burks being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the 14th day of January,1975 he served a copy of the within Affirmation by placing the same in aproperly postpaid franked envelope addressed: see attached

And deponent further says that he sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York

Patricia D. Burks

Sworn to me before this

14th day of January,1975

Janette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975

[¶ 75,368] **United States v. Patrick M. King (Criminal Action No. 28,264); United States v. George Duthie (Criminal Action No. 28,265).**

U. S. District Court, Western District of Kentucky, at Louisville. Dated July 10, 1974. Case Nos. 2354, 2355, Antitrust Division, Department of Justice.

Sherman Act

Department of Justice Enforcement—Selection of Grand Jury—Irregularities.—Perjury indictments against two officials of a mechanical contracting firm were not dismissed because of asserted irregularities in the selection of the grand jury. Rejected as insufficient to warrant dismissal were the court's use of wastebaskets as a substitute for the required jury wheel, allowing the clerk of the court to rule on disqualifications and exemptions without formal approval by the court, and the use of primary rather than general election voter lists. Although this excluded independent voters from the class of persons who could be selected as jurors, it did not amount to an intentional exclusion of a distinct class, under the circumstances of the case. Also rejected was a claim that the grand jury constituted an unlawfully empanelled "special" grand jury. **See ¶ 8577.**

Memorandum Opinion and Order

ALLEN, D. J.: This action is submitted to the Court on the motion of the defendants to dismiss the indictment based on certain alleged instances of substantial noncompliance by the Clerk and by the Court with the Jury Selection and Service Act of 1968, as amended. Subsequent to the filing of the motion, the Court allowed the defendants to introduce into evidence the deposition of Chief Judge James F. Gordon of this District, and the testimony of Mr. August Winkenhofer, Clerk, together with that of a representative of the Stewart Mechanical Contractors.

The motion of the defendants is based on five separate grounds. The Court will, therefore, discuss each of these grounds under a separate heading.

[*Master Jury Wheel*]

The first ground for attack is that the Clerk and the Court failed to employ a proper master jury wheel as required by the Jury Selection and Service Act of 1968, 28 U. S. C. §§ 1863(b)(4) and 1869(g).

28 U. S. C. § 1863(b)(4) provides, in part, for a master jury wheel or a device similar in purpose and function into which the names of those randomly selected shall be placed. 28 U. S. C. § 1869(g) states:

> "'jury wheel' shall include any device or system similar in purpose or function, such as a properly programmed electronic data processing system or device;"

On March 22, 1968 the Jury Selection and Service Act of 1968 was approved by Congress on March 27, 1968 [*sic*]. It was to become effective 270 days thereafter. Mr. Martin L. Glenn, who was Clerk of this District until July 17, 1968, had ordered for the Court four jury wheels which were too small to be used for the purpose contemplated by the Act. When his successor, the present Clerk, Mr. August Winkenhofer, assumed his office, he went to the chambers of The Honorable Henry L. Brooks, then Chief Judge for this District and later Judge for the United States Court of Appeals for the Sixth Circuit. He informed Judge Brooks there were no funds in the office of the Clerk with which to purchase jury wheels, but stated that he could provide two new wastebaskets which could be used for the purpose of insuring the mixing up of jurors' names pursuant to the Plan for random jury selection. Judge Brooks approved the substitution of the wastebaskets for the jury wheels. The wastebaskets in question were close to 30" to 36" high and 12" to 16" in width.

It should be noted, in this connection, that Mr. Winkenhofer showed to Judge Brooks some brochures which referred to the cost of jury drums as running from $400 to $800, and also discussed with Judge Brooks the fact that delivery could not be obtained on these for a period of time. The defendants introduced testimony to the effect that an appropriate jury wheel

could have been constructed for a little over $100, as of 1974.

Mr. Winkenhofer testified that he took all the labels of the counties in the Louisville jury division and placed them in the two wastebaskets. Then he would take his hand and shuffle them or let them drift. He stated that an approximation was made of the names that went into the two wastebaskets, and that after the names were in the baskets, he called the representatives of the press to show them how the names were drawn out from the basket. Each time that a drawing was made, five names were drawn out in order to facilitate the typing of the list of jurors. The total of names which were put in the wastebasket was 6 278, which constituted 1/50th of the 314,6[illegible] voters registered in the counties comprising the Louisville jury division. There are no reported cases pertaining to the substitution of wastebaskets for a jury wheel which have arisen under the Jury Selection and Service Act of 1968. Examination of the Act in general, and of the jury wheel provisions in particular, indicates to this Court that the overriding purpose of Congress was to secure the random selection of grand and petit jurors.

In this respect, Mr. Winkenhofer's use of the wastebaskets as a substitute for the jury wheel conforms with the spirit of 28 U. S. C. §§ 1863(b)(4) and 1869(g). The purpose for which the wastebaskets were used was exactly the same as the purpose for which a master jury wheel would have been used. Insofar as function is concerned, Mr. Winkenhofer testified that the use of the wastebaskets resulted, in his opinion, in a more complete and better shuffle of names than would have the use of a master jury wheel. Even if this be taken as a somewhat overblown claim for the merit of the wastebaskets, the Court is convinced that the method used by the Clerk resulted in a fair and random jury selection, even if it was technically erroneous to use such a device.

[*Jury Disqualifications*]

The next attack of the defendants is based on the policy followed by the Court in allowing the Clerk to rule on disqualifications and exemptions of prospective jurors under the Jury Selection and Service Plan of 1968. Under the Act, certain classes of persons such as convicted felons and persons who cannot read the English language are disqualified from serving as jurors. Certain other classes of person, such as officials of state or federal governments, are exempt from serving as federal jurors, see 28 U. S. C. § 1863(b)(6). Also, in addition, the district court is entitled, pursuant ot 28 U. S. C. § 1863(b)(5), to specify groups of persons or occupational classes whose members shall, on individual request, be excused from service as a juror; see, also, 28 U. S. C. § 1863(b)(6).

[*Ruling by Clerk*]

Following the enactment of the Act, then Chief Judge Brooks and District Judge James F. Gordon, now Chief Judge, instructed the Clerk that he should rule on disqualifications and exemptions of prospective jurors, except for those jurors who requested an excuse on the grounds of (g) and (l), Section IX of the Jury Selection Plan for this District. Section IX (g) provides that "[a]ny person essential or indispensable to a business, commercial or agricultural enterprise" may be excused on individual request. Subsection (l) provides for the excusing of "[a]ny other person whose service would entail undue and extreme hardship as determined by the Court."

As stated by the Clerk in his testimony, the decision with regards to these two categories requires the exercise of discretion and, therefore, these determinations were to be made by the Judges themselves rather than by the Clerk. The other exemptions provided for by the Plan pertain to persons who were in easily ascertainable classes and whose membership in these classes could be established by the Clerk by merely looking at the form and examining answers to the questionnaire.

The defendants take the position that this strictly ministerial task must be performed by the district judge, and that failure to do so constitutes grounds for dismissing the indictment. 28 U. S. C. § 1865 requires that the chief judge of the district court or such other district court judge as the Plan may provide, on his initiative or on recommendation of the Clerk or Jury Commissioner, shall determine solely on the basis of information provided on the juror qualification form and other competent evidence whether a person is unqualified for, basis of information provided on the juror service. In *United States v. Tijerina*, 446 F. 2d 675 (10th Cir. 1971), the Clerk of the court made recommendations as to the prospective jurors based on his examination of the questionnaire. This, of course, was in accord with the language of the

statute and is not of substantial assistance in the disposition of the claim here. The Court believes, however, in the absence of controlling authority, that while the defendants may have shown a technical breach of the provisions requiring the Court to pass upon exemptions or disqualifications, that the method followed by the Clerk pursuant to instructions from Judges Brooks and Gordon substantially complied with the purpose of the Act, which was to prevent the arbitrary exclusion of any qualified jurors from jury service, and which was also to insure that those prospective jurors, who were either exempt under the explicit sections of the Act or Jury Plan, or disqualified under the Act, shall not be required to serve.

As stated before, the function of the Clerk, as carried out here, was ministerial and ascertainable from an examination of the questionnaires and required no discretion on his part. To have required him to have obtained the approval of the district judges would, under those circumstances, have been a mere formality, even though it would have been better practice to have observed the formality.

[*Voting Registration Lists*]

The next attack on the indictment arises out of the Clerk not using the general election registration lists of November, 1968 as a basis for obtaining grand and petit jurors. The evidence shows that while the Jury Selection Act was passed on March 27, 1968, it was to go into effect 270 days thereafter. The Clerk of this Court, at the time of the passage of this Act, was Mr. Martin L. Glenn. He initiated the policy of requesting from the clerks of the counties that comprise the Louisville division their lists of registered voters who were entitled to vote in the primary election of May, 1968. This was done because of the fear of the Judges of this Court and the Clerk that the general election lists of November, 1968 might not be made available to the Clerk in time for the implementation of the 1968 Act. Evidence adduced at the hearing shows that in some instances registration lists were not received until four or five months after the primary election, although, on the other hand, some general election lists were received within six to eight weeks after the holding of that election.

As a practical matter, the use of the primary registration lists barred the use of the names of any independent voters or those of any other party affiliation, except for Democrats and Republicans. The Court's survey of the registration lists of 1967 through 1971 reveals that Jefferson County, which furnishes the great majority of the jurors for the Louisville division, is the county wherein the largest percentage and number of independent voters reside. In this county, the number of independent voters has never amounted to as much as 10 percent of the total voter registration. For example, in 1967, there were 249,963 registered voters in Jefferson County, of which the independents accounted for 21,423. In 1971, there were 235,259 registered voters in Jefferson County, of which the independents accounted for 18,288 and all other parties accounted for 266.

In addition to the exclusion of independents from the list of prospective jurors under the 1968 Plan, there were excluded, of course, those voters who registered between the time of the primary election and the general election, either as Democrats or Republicans. In Jefferson County, in 1968, there were registered 233,387 Republicans and Democrats; in November, 1968, there were registered 272,129 voters. These voters comprised all persons registered to vote and entitled to vote in the general election in November, 1968, and comprised Republicans, Democrats, Independents, and members of all other political parties.

The Court observes that, while not determinative of the issues here, out of over one and one-half million registered voters in 1971 in Kentucky, there were only approximately 35,000 independent voters, meaning that the percentage of independent voters in Kentucky, as a whole, was approximately 2.5 percent of the total, as contrasted with the approximately 7.5 to 8 percent in Jefferson County.

The defendants' contentions with respect to the exclusion of independent voters from the 1968 Plan, and the exclusion of those voters who registered between May, 1968 and the time of the general election in November of that year, are refuted by the reasoning and holding of District Judge Latchum in the case of *United States v. Matthews*, 350 F. Supp. 1103, 1108-10 (D. C. Del. 1972). In that case the District Court of Delaware used, for purposes of selecting the names of prospective jurors, voter registration lists of all Delaware registered voters as of September 1, 1968. As in Kentucky, there were additional registrations of persons between September 1, 1968 and the final registrations in October, 1968.

The final list of those registered to vote in the 1968 presidential election was not completed by the election commission and available until the week of February 2, 1968. There was a partial revised list prepared as of November 1, 1968, but it was incomplete as it did not include supplemental registrations in one county, which were not received until November 20, 1968.

The court stated in *Matthews* that the most recent list available of registered voters which had been prepared for official purposes was that of September 7, 1968. It further stated that it would have been impossible for the Clerk to have put the selection process system into operation within the time limitation required by the Act without using the September 7th list. The court further held that the September 7th list complied with the primary objective of the Act and the Plan, in that the prospective jurors selected represented a fair cross-section of the community and there was no discrimination or exclusion of any group from jury service. The court further stated that the voter registration lists were the most recent official records available in time to permit the Clerk to comply with the statute's intent and enable the new Jury Selection system to proceed in accordance with the purposes and policies of the Act.

This Court holds that the Clerk was justified in using the primary lists made available to him by the various counties within the Louisville division in order to implement the Jury Selection Plan within the time prescribed by the statute. Had he waited until the general election held in November, 1968, he would not have been able to complete the selection of the names to be drawn for the jury until some time in 1969.

[*Exclusion of Independent Voters*]

A somewhat more serious question is raised by the actual exclusion of independent voters as a class from those who could be selected as jurors. The answer to this must lie in the practicalities and time limitations imposed upon the Clerk by the enactment of the 1968 Act. In *Matthews*, it is stated that the primary purposes of the Act are:

"(1) to insure all litigants in federal courts entitled to trial by jury of the *right* to grand and petit juries selected at random from a fair cross-section of the community,

"(2) to provide all citizens with the *opportunity* to be considered for service on grand and petit juries, and

"(3) to prohibit exclusion from such service on account of race, color, religion, sex, national origin or economic status."

The Court believes that the jury system, as implemented by the Clerk in District Court, fully meets the purposes of (1) and (3) set out hereinabove. It could be argued with some merit that it does not meet purpose number (2), but this is an argument that would address itself to those independents who might consider themselves as having been deprived of the right to serve under the 1968 Act. The defendants are not entitled to a mirror of the community in the jury selection process. Under the evidence, there is no testimony of any intent on the part of either the Clerk or the Court to intentionally exclude persons from jury service on account of their race, color, religion, sex, national origin or economic status, nor is there any showing that the defendants have been deprived of their right to grand and petit jurors selected at random from a fair cross-section of the community. See, in this connection, *United States v. Ware*, 473 F. 2d 530 (9th Cir. 1973), and *United States v. Warwar*, 478 F. 2d 1183 (1st Cir. 1973). See, also, *United States v. Ponder*, 444 F. 2d 816 (5th Cir. 1971), cert. denied 405 U. S. 918.

In concluding that the use by the Clerk of the 1968 primary registration list is not a substantial departure from the Act, the Court also relies, to some extent, upon *United States v. Ross*, 468 F. 2d 1213 (9th Cir. 1972). There the jury commissioner, in refilling the master jury wheel in 1970, violated the Act by refilling it with names taken from voter lists other than those for the most recent state or federal general election. The court held that while this practice was a violation of 28 U. S. C. § 1869(c), it was harmless error which did not entitle the appellant to a reversal of his conviction. In *Ross*, three of the five non-conforming lists that were used by the Clerk, in technical violation of the Act, included the names of most of the persons who voted in the 1968 general election, persons who did not vote but requested to be reinstated, and persons who registered since the election. The court concluded that the use of non-conforming lists probably resulted in a larger pool of potential jurors than if the counties involved had provided lists of persons who actually voted in the 1968 general election.

United States v. Ross, supra, demonstrates the principle that all technical violations of 28 U. S. C. § 1869(c) do not justify the setting aside of a jury verdict of guilty, or by analogy here, the dismissal of an indictment. It is true that in *Ross,* the violation of the statute probably resulted in a larger pool of potential jurors than if the statute had been followed, whereas here, concededly, the use of the primary registration lists resulted in a smaller number of potential jurors.

In *United States v. Butera,* 420 F. 2d 564 (1st Cir. 1970), a case decided prior to the enactment of the 1968 Act, the court pointed out that it had been willing to give a broad meaning to the requisite distinction of classes, but that it refused to hold that residents of some counties had views and attitudes genuinely distinct from those of nearby counties. This Court refuses to hold that the exclusion of independent voters in 1968 was an intentional exclusion of a distinct class of persons within the meaning and purposes of the 1968 Act. Concededly, such an exclusion resulted in a slight underrepresentation of Jefferson County jurors in the jury pool, since Jefferson County contains the largest percentage of independent voters of any county contained within the division.

[*"Special" Grand Juries*]

Finally, the defendants asks the Court to dismiss the indictment on the grounds the grand jury of 1971 before whom the defendants appeared and the grand jury of 1972 which indicted them constitute "special" grand juries illegally empanelled, contrary to the provisions of 18 U. S. C. § 3331. In order to determine the validity of this contention, some background factual information is necessary.

On April 23, 1971 a letter was addressed to Mr. George Long, United States Attorney, in Louisville, by Carl L. Steinhouse, Chief of the Great Lakes Field Office, Antitrust Division of the Department of Justice, acting on behalf of Walter B. Comegys, Acting Assistant Attorney General, Antitrust Division. This letter requested Mr. Long to ask the Court to empanel a special grand jury to inquire into possible violations of the antitrust laws, and particularly the Sherman Antitrust Act, 15 U. S. C. § 1, et seq. In the second paragraph of the letter, Mr. Steinhouse stated that the Court has authority to call a special grand jury under Rule 6 (a), Federal Rules of Criminal Procedure. That Rule provides that "the Court shall order one or more grand juries to be summoned at such times as the public interest requires."

The letter from Steinhouse, at no time, referred to 18 U. S. C. § 3333, which was enacted as a part of the Organized Crime Control Act of 1970. That Act, as its title indicates, is primarily concerned with the organized criminal activity, whether of an official or private nature, and does require that any special grand jury empanelled under it be summoned after the Attorney General, the Deputy Attorney General or any designated Assistant Attorney General certifies in writing to the Chief Judge of the District that, in his judgment, a special grand jury is necessary because of criminal activity in the District.

On May 3, 1971, Judge Gordon entered an order which stated in part that the Attorney General had requested the empanelling of a special grand jury for the investigation of possible violations of the Sherman Antitrust Act, and which then ordered the Clerk to draw the names of 80 persons to serve as grand jurors commencing May 20, 1971 and to so serve for as long as was necessary.

On May 10, 1972, Mr. Steinhouse requested Judge Gordon by letter to order the empanelling of an antitrust grand jury on June 19th. No reference was made to 18 U. S. C. § 3333, or to any organized crime activity within the District. Here, again, the Court believes that the United States was not proceeding under the Organized Crime Control Act, but was proceeding under Rule 6(a), Federal Rules of Criminal Procedure, to request Judge Gordon to empanel a grand jury which would inquire into antitrust violations. Under these circumstances, no designation in writing was required to be made by the Attorney General, the designated Assistant Attorney General or the Deputy Attorney General.

An identical order to that of May 3, 1971 was entered by Judge Gordon on May 17, 1972. Also to be noted is the entry of an order on May 21, 1971 which recites the qualifications of 23 persons as special grand jurors for the investigation of possible violations of the Sherman Antitrust Act.

While Judge Gordon, in his orders empanelling the two antitrust grand juries, may have referred to them as "special" grand juries, and while the Clerk and this Court may also have followed that nomen-

clature, this Court is of the opinion that this was done so as to distinguish between the first grand jury which had been empanelled in 1971 in Louisville and the antitrust grand jury. This opinion is buttressed by the fact that the United States, acting through Will Wilson, Assistant Attorney General, on March 13, 1971, requested Judge Gordon, in writing, and pursuant to the Organized Crime Control Act of 1970, for the empanelling of a special grand jury because of criminal activity in the district. This letter is evidence of the fact that the Government knew how to properly request the Chief Judge for the empanelling of an organized crime special grand jury when this was appropriate.

In conclusion, the motions of the defendants to dismiss the indictment because of alleged violations and substantial departures from the provisions of the Jury Selection and Service Act of 1968 are hereby overruled.

It Is So Ordered.

[¶ 75,369] James W. Sanderson v. The Honorable Fred M. Winner, U. S. District Judge for the District of Colorado.

U. S. Court of Appeals, Tenth Circuit. No. 74-1477. Filed November 26, 1974. Petition for Writ of Mandamus and Prohibition to the U. S. District Court for the District of Colorado.

Sherman Act

Private Suits—Discovery—Financial Ability of Plaintiffs to Pay for Class Action Costs—Attorney Fee Arrangements—Relevance to Class Determination.—Antitrust defendants were not entitled to discover plaintiffs' financial statements, income tax returns, fee or cost arrangements with their attorneys, or other documents showing their ability to finance purported class litigation. Although the *Eisen* decision requires that decent notice be given to potential class members, there is nothing in the opinion calling for unlimited discovery into the financial capacity of a plaintiff to pay notice costs. Nor was it relevant in determining if class treatment was appropriate whether or not plaintiffs could pay all of the costs in the litigation. Lower courts that have considered the plaintiff's ability to pay as relevant and proper to such a determination were faced with purported classes of all new car purchasers in the United States, and, therefore, were properly concerned about the class representative's ability to adequately represent the class. Nor did the defendants have any legitimate concern as to whether the plaintiffs would be able to pay their attorneys or a judgment for costs. If such judgment were entered, defendants would have ample opportunity for discovery. The court declined to rule on whether fee arrangements were privileged matters, it having held them to be irrelevant at this stage of the litigation. **See ¶ 9032, 9247.**

For petitioner: Granvil I. Specks, of Specks & Goldberg, Ltd., Chicago, Ill. (Richard M. Kranzler, of Brenman, Sobol & Baum, Denver, Colo., on brief). **For respondent:** Patrick M. Westfeldt, of Holland & Hart, Denver, Colo. (H. L. Arkin, of Arkin & Hanlon, Denver, Colo., R. Brooke Jackson, of Holland & Hart, and David Brice Toy and Pamela Ann Rymer, of Lillick, McHose, Wheat, Adams & Charles, Los Angeles, Cal., on brief).

Before: SETH, HOLLOWAY and DOYLE, Circuit Judges.

[Opinion]

PER CURIAM: Plaintiffs seek the issuance of writs of mandamus and prohibition which would direct the district court to vacate certain discovery orders entered June 25, 1974 and prohibit the court from issuing future discovery orders which would invade the attorney-client privilege relating to financial arrangements with attorneys.

The complaint describes a class action pursuant to Rule 23(b)(3). The allegation is that the various Nissan Corporations named in the complaint in the district court have engaged in an unlawful conspiracy with the named dealerships to violate § 1 of the Sherman Act.

[Documents Requested]

The present conflict results from a notice to take depositions in which plaintiffs were served with a demand for the production of the following documents:

2. Current financial statements, income tax returns for the years 1972 and 1973,